

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THURSTON WAYNE KEINONEN,

Defendant-Appellant.

UNPUBLISHED

May 22, 2012

No. 302102

Grand Traverse Circuit Court

LC No. 10-011104-FC

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Defendant Thurston Wayne Keinonen appeals by right his jury convictions of armed robbery, MCL 750.529, receiving or concealing a stolen firearm, MCL 750.535b, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Because we conclude that there were no errors warranting relief, we affirm.

The prosecution presented evidence that defendant went to a mini golf business, showed the clerks a gun, and demanded money. The clerks emptied the two cash registers and handed defendant a bank bag with over \$600. After defendant left, a deputy heard an alert, saw a vehicle that matched the alert, and pulled the vehicle's driver over. The deputy testified that he drew his gun and ordered the occupants to "get their hands out of the window." The deputy testified that the driver began to call out his name and he stated that he immediately recognized defendant's voice. On cross-examination, the deputy noted that defendant appeared to be under the influence because he was acting erratically; he also described defendant's behavior as being unusual because he was "[v]ery nice and as I know him to [be] very rude."

In addition to this evidence, the prosecutor played a recording of defendant's interview with a detective from the night of the incident. The recording showed defendant coming down from a methadone high; the recording also contained defendant's statement concerning the events at issue.

Defendant's trial lawyer argued that defendant was not guilty of armed robbery or some of the weapons offenses because he did not display or carry a firearm during the events at issue. Specifically, defendant's trial lawyer argued that the evidence showed that defendant and the two clerks agreed to a plan in which the clerks would give defendant the money and later split it or use it to purchase drugs. Defendant's trial counsel conceded that defendant had admitted that he possessed a stolen pistol, but argued that the jury must still decide if defendant was guilty of carrying a concealed weapon.

On appeal, defendant argues that his trial lawyer's performance was constitutionally deficient in several regards and, for that reason, he is entitled to a new trial. Because the trial court did not hold an evidentiary hearing on defendant's ineffective assistance of counsel claim, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, a defendant must show that his trial lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the errors, the outcome of the lower court proceeding would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). In evaluating a claim of ineffective assistance of counsel, this Court presumes that the defendant's trial lawyer was effective and the defendant bears a heavy burden in proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). As this Court recently explained, this presumption requires a reviewing court to affirmatively entertain the range of legitimate reasons for the trial lawyer's acts or omission:

Because there are countless ways to provide effective assistance in any given case, in reviewing a claim that counsel was ineffective, courts must "indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to "affirmatively entertain the range of possible reasons" that counsel may have had for proceeding as he or she did. That inquiry is objective; although the reviewing court may not engage in a post hoc rationalization of the counsel's decision-making that contradicts the available evidence, neither may courts insist that counsel confirm every aspect of the strategic basis for his or her actions. Accordingly, a reviewing court must conclude that the defendant's trial counsel's act or omission fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission. [*People v Gioglio (On Remand)*, ___ Mich App ___, slip op. at 5; ___ NW2d ___ (Docket No. 293629, released March 20, 2012) (citations omitted).]

Defendant first argues that trial counsel was ineffective for not requesting an instruction on the lesser included offense of larceny from a person instead of forcing the jury to find armed robbery or nothing at all.

Here, defendant's theory was that the clerks voluntarily gave him the money because they were all in on the plan. Accordingly, under defendant's own theory, while his acts might have been illegal, they did not constitute larceny from a person. See MCL 750.357. And defendant's trial lawyer might legitimately have decided not to request an instruction on larceny from a person because that instruction was inconsistent with defendant's theory of the case. See *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). The fact that this strategy did not succeed does not render its use ineffective. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). Similarly, it is entirely reasonable for a trial lawyer to refrain from requesting a lesser included offense instruction in order to increase the likelihood that the jury will acquit the defendant altogether. See *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986). Therefore, defendant has failed to overcome the presumption that his trial lawyer's decision on the instruction was a matter of legitimate trial strategy. *Gioglio*, ___ Mich App, slip op. at 5.

Defendant next argues that counsel rendered ineffective assistance by failing to object to the deputy's testimony that he immediately recognized defendant's voice, and by accepting the trial court's cautionary instruction on the possible reasons for the deputy's familiarity with defendant.

The deputy's comments at trial implied that he had had prior contact with defendant, which might have included contact from prior criminal investigations. After a juror inquired about the basis of the deputy's knowledge, the trial court discussed the matter with the lawyers and instructed the jury that the basis of the deputy's knowledge was irrelevant:

THE COURT: Let me explain. There was a question asked. The question asked –[the deputy] mentioned he knew his voice and how did he know his voice. [The deputy] has been a police officer for a number of years in this area. There could be a dozen reasons why he might know and would not be relevant to this case.

Although defendant's trial lawyer did not immediately object to the deputy's testimony, the record shows that defendant's trial lawyer discussed the matter with the court and accepted the trial court's instruction. A reasonable trial lawyer could legitimately conclude that the best way to handle this testimony was to discuss it out of the jury's presence and obtain a cautionary instruction similar to that given by the trial court, see *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors."), rather than object immediately and draw attention to the fact that the deputy had had prior contact with defendant such that he could immediately recognize his voice. For that reason, we conclude that defendant has failed to overcome the presumption that his trial lawyer's handling of this matter was anything other than sound trial strategy. *Gioglio*, ___ Mich App, slip op. at 5.

Finally, defendant argues that trial counsel rendered ineffective assistance by failing to object to the playing of defendant's recorded interview from the night of the incident.

Defendant's trial lawyer initially moved to suppress the recording, but withdrew the motion. The recording at issue showed defendant in a somewhat sympathetic light in that it showed that he was suffering from withdrawal; in addition, by permitting the recording to be played for the jury, defendant's trial lawyer effectively got defendant's version of events before the jury without exposing him to a possibly damaging cross-examination. Given the nature of the recording and defendant's theory of the case, a reasonable trial lawyer might conclude that the benefits of allowing the recording to be played for the jury outweighed the possible negative inferences. Consequently, we must presume that defendant's trial lawyer's decision was motivated by legitimate considerations of trial strategy. *Gioglio*, ___ Mich App, slip op. at 5.

Defendant failed to establish that any of his trial lawyer's acts or omission fell below an objective standard of reasonableness under prevailing professional norms.

Affirmed.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly